

Jassy, Inc.,
d/b/a Busy Corner Drugs
3401 Michigan Avenue
East Chicago, Indiana 46312

DL45-82281
District 1

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The permittee, Jassy, Inc., d/b/a Busy Corner Drugs, 3401 Michigan Avenue, East Chicago, Indiana 46312 (permittee) is the holder of a type 208, Alcohol and Tobacco Commission (ATC) permit, #DL45-82281. The permittee filed its 2000 renewal on August 18, 2000 and that renewal was assigned to the Lake County Local Board (LB) for hearing. The LB heard the renewal request on May 3, 2001, and on that same day, voted 4 – 0 to deny the renewal. The ATC adopted the recommendation of the LB on May 15, 2001, and denied the renewal.

The permittee filed a timely notice of appeal and the matter was assigned to ATC Hearing Judge, Daniel M. Steiner (HJ). The HJ assigned the matter for hearing on October 18, 2001, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement.¹ The permittee, appearing through its owner, Gurdev Singh, was represented by Joseph F. Quill. There were no remonstrators. Following the hearing, the ATC remanded the matter back to the LB for consideration of a notice issue.² That Board reheard the matter on April 4, 2002, with Gurdev Singh in attendance, and denied the renewal by a 3 – 0 vote. The ATC adopted the LB's ruling on April 16, 2002. The permittee once again timely appealed to the ATC, which held a second appeal hearing on October 8, 2002. Permittee, again appearing through Gurdev Singh, was represented the second time around, in both the LB and before the ATC, by attorney Patrick Shuster of Crown Point, Indiana. Remonstrator, the East Chicago Police Department (ECPD), appeared at both the LB and ATC hearings through an investigative officer.

¹ Permittee has operated in the interim on several 90 day extensions pursuant to IC 7.1-3-1-3.1, issued on September 8, 2000, December 19, 2000, March 6, 2001, May 10, 2001, July 27, 2001, November 29, 2001, March 6, 2002, April 17, 2002, July 3, 2002, October 9, 2002, and January 7, 2003.

² The ATC files indicate that the cause was continued several times by the LB from the initially scheduled hearing of December 19, 2000, until the first LB hearing on May 3, 2001. At that time, Gurdev Singh's brother, Rangit, an employee of permittee attended the hearing and was apparently under the impression that the matter would be continued again due to Gurdev's absence in India, recuperating from an injury suffered while there. The taped LB record indicates that Rangit Singh was unable to or did not fully understand all of the LB's questions.

On appeal, permittee claimed that before the LB, he was the victim of selective enforcement in that no similar actions had been taken against the prior owner of Busy Corner Drugs, despite similar violations, and that he was unable to cross-examine remonstrator ECPD's allegations of numerous police reports made against Busy Corner Drugs.

The HJ now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.³

II. EVIDENCE AT THE HEARING A. WITNESSES

The following witness testified before the HJ at the hearing and offered the following evidence in support of the permittee:

Gurdev Singh (G. Singh). He has owned 100% of Jassy, Inc., since July, 1995, which operates as its only entity Busy Corner Drugs. He worked daily at the business from 1995 until sometime in May, 2000, when he went to India to visit his ailing parents. He left his brother, Rangit Singh (R. Singh) in charge of the store in his absence. While in India, G. Singh was involved in an automobile accident and unable to return to the United States for several months. On May 31, 2000 and January 21, 2001, permittee was cited for illegal sales of alcohol on Sunday. G. Singh's brother, R. Singh was the clerk on duty for all three citations. G. Singh was not present for any of the illegal sales. Upon his return to Indiana, and upon discovering the illegal sales, G. Singh fired his brother R. Singh, and has been running the store on a daily basis since some time in 2001. G. Singh's son, a student at Rose Hulman returned to East Chicago to help his family run the store. Since G. Singh has resumed on-site operation of the store, there have been no other illegal sales citations written against Busy Corner Drugs.

The following witness testified as a remonstrator before the HJ and offered the following evidence in opposition to the permittee:

Louis Arcuri, Sergeant, ECPD. Sgt. Arcuri testified that since 1998, there had been approximately sixty two (62) complaints against Busy Corner Drugs, including those which have resulted in Sunday sales violations. However, on cross examination, he indicated that there were no police reports or any other official records regarding these violations exist, and further, that neither he nor any other ECPD officer had talked to G. Singh regarding any complaints. Sgt. Arcuri stated that through the use of informants, it had come to his attention that permittee, since G. Singh had returned

³ Effective January 6, 2003, Mark C. Webb replaced Daniel M. Steiner as Executive Secretary and Hearing Judge of the ATC. Prior to issuing these Proposed Findings of Fact and Conclusions of Law, HJ Webb has listened to the tapes of both Local Board hearings as well as both hearings held before HJ Steiner, and has reviewed all exhibits submitted at all four hearings.

run the business, had engaged in the unlawful sales of Viagra without a prescription, but that due to the press of other matters, the matter had not been turned over to the Lake County Prosecutor.

B. EXHIBITS

No exhibits were introduced at the appeal hearing by either side in support of their respective positions.

C. FINDINGS OF FACT

1. The permittee, Jassy, Inc., d/b/a Busy Corner Drugs, 3401 Michigan Avenue, East Chicago, Indiana 46312 (permittee) is the holder of a type 208, Alcohol and Tobacco Commission (ATC) permit, #DL45-82281. (ATC File)
2. Jassy, Inc. is owned 100% by Gurdev Singh, who first acquired the permit on October 17, 1995. (ATC File).
3. Said permit has been renewed on an annual basis through October 15, 2000. (ATC File).
4. Permittee has been cited and has admitted violations for illegal Sunday sales⁴ on the following occasions since 1995: (ATC File; LB Hearing)
 - a. May 31, 1998
 - b. May 7, 2000
 - c. January 21, 2001
5. There is an allegation of an illegal Sunday sale for June 18, 2000, but no evidence that a violation was ever filed over it. (ATC File).⁵
6. G. Singh was not present when any violations of law occurred on his premises, nor was any evidence presented that he was aware of or condoned said violations as they occurred. (ATC Hearing).
7. During the time covering the period between at least May 7, 2000 and at least January 21, 2001, G. Singh was in India, and had little control over what happened on permittee's premises. (ATC Hearing).
8. During the time covering the period between at least May 7, 2000 and at least January 21, 2001, G. Singh left permittee's premises under the charge of his brother R. Singh. (ATC Hearing)
9. G. Singh's decision to put his brother in charge of the premises during his absence was not unreasonable under circumstances.
10. G. Singh's extended stay in India due to his accident while there was not foreseeable and there is no evidence in the record to suggest that he was negligent in allowing R. Singh to run Busy Corner Drugs in his prolonged absence.
11. G. Singh did not find out about the May 7, 2000 and January 21, 2001 illegal Sunday sales violations until after he returned to Indiana from India. (ATC Hearing).

⁴ IC 7.1-3-1-14; IC 7.1-5-10-1(a)(1).

⁵ A review of the LB hearings on May 3, 2001 and April 4, 2002, shows that the with the uncharged violation of June 18, 2000, that the LB erroneously believed that permittee had actually been cited for three illegal Sunday sales violations within a 12 month period and denied renewal on that basis.

12. Upon discovering said violations, G. Singh terminated the employment of his brother, R. Singh and with the help of his family, resumed running Busy Corner Drugs on a daily basis. (ATC Hearing).
13. Since G. Singh and his family have resumed operating Busy Corner Drugs, there have been no further violations of record filed against permittee. (ATC File; ATC Hearing).
14. Busy Corner Drugs does not currently possess a type of cash register which would require the entering of the barcode of a given product, including any alcoholic beverage, and which is thus programmable to prohibit the ringing up of a sale of an alcoholic beverage on Sunday. (ATC Hearing).
15. Such cash register security devices are readily available and widely used by alcoholic beverage retailers and dealers to prohibit the completion of an alcoholic beverage transaction on Sunday or at other times when such sales are unlawful. (ATC Hearing; information known to the ATC).
16. The HJ finds that the installation of such a sales security system in permittee's premises would greatly minimize or end altogether the ability for permittee to illegally sell alcoholic beverages on Sunday. (ATC Hearing; information known to the ATC).
17. Requiring permittee to install such a sales security system adequately addresses the gravity of permittee's violations, and does not inflict an unduly harsh penalty upon G. Singh for circumstances over which he had little, if any control during his prolonged absence in India.
18. G. Singh's character as displayed during the LB Hearing as well as before the HJ indicate that he has shown remorse and accepted responsibility for permittee's illegal Sunday sales violations and that he is willing to take all necessary steps to see that further violations do not occur. (LB Hearing; ATC Hearing).
19. Regarding the 62 alleged complaints made to Sgt. Arcuri and/or the ECPD, no records of them were produced at the hearing in this cause nor exist for the ATC to examine, and permittee, through counsel, has been unable to cross-examine the veracity of these reports. Thus the HJ is unable to draw any inferences from them or to give them any weight in determining whether the permit in this matter should be renewed.
20. Permittee failed to introduce evidence sufficient to show that he was the victim of selective enforcement on the part of the Lake County LB or the ECPD.⁶

D. CONCLUSIONS OF LAW

1. The permittee, Jassy, Inc., d/b/a Busy Corner Drugs, 3401 Michigan Avenue, East Chicago, Indiana 46312 (permittee) is the holder of a type 208, Alcohol

⁶ Permittee's argument that despite similar violations by the previous owner, nonrenewals were not sought nor imposed, is disingenuous. Under permittee's theory, once a bad permittee is shown tolerance as to a particular violation, then all other permittees must be similarly allowed to disregard the same rule or regulation complained of. Such a result is neither a desired public policy nor a logical expression of the General Assembly's intent under IC 7.1-1-1-1 or IC 7.1-2-3-4(h) (with respect to enforcement or rules and regulations of the Commission).

- and Tobacco Commission (ATC) permit, #DL45-82281, first issued on October 17, 1995 and renewed annually thereafter through October 15, 2000.
2. In deciding whether to renew a permit, the only issues to be determined by the Commission are whether the permittee is of good moral character and of good repute and whether permittee has allowed the permit premises to become a public nuisance. 905 IAC 1-27-5.
 3. G. Singh's attitude as shown in his testimony before the LB and before the ATC, as well as other evidence presented before the ATC indicate that he is of good moral character and of good repute.
 4. Because permittee has three (3) record violations of illegal Sunday sales and the ATC file indicates an uncharged fourth violation, the issue of whether permittee has allowed the premises to become a public nuisance is a closer question. However, under the record presented in this case, the HJ declines to find a public nuisance.⁷
 5. Requiring the installation of a sales register security device which must be approved by the Commission prior to further sales of alcoholic beverages will stop inadvertent illegal Sunday sales and will adequately address society's interest in compliance with this particular law, is the least means to accomplish this goal, and for the reasons stated in *footnote 7, supra*, a harsher penalty to this permittee would be an excessive penalty under these circumstances.⁸
 6. The Commission may reverse the LB's action in denying renewal of said permit if it finds that the LB's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence.⁹
 7. There was no compelling substantial evidence against the renewal of this permit at either the LB hearing or the ATC appeal hearing, and for the HJ to affirm the LB in this instance would not be supported by substantial evidence.
 8. Having approved a renewal, however, the permit in this matter is hereby **SUSPENDED** pending Permittee's installation of the required sales register security device, and the Commission's approval of the same.

⁷ Several factors influence this determination. First, the single nature of the violations at issue here; second, that G. Singh was not present when any of them occurred; third, given his actions to remedy the situation once he became aware of the problems, fourth, the lack of records to substantiate or detail the nature of the 62 alleged complaints claimed by Sgt. Arcuri, ECPD; and fifth, that no further violations have been filed against permittee since G. Singh and his family resumed operation of the premises.

⁸ That is not to say that further violations of IC 7.1-3-1-14 or IC 7.1-5-10-1, notwithstanding the installation of the required cash register security device, might not be sufficient confirm the existence of a public nuisance and to warrant nonrenewal of a permit. Permittee is urged to be mindful of 905 IAC 1-27-2, and the sanctions contained in IC 7.1-2-6-1 through IC 7.1-2-6-14.

⁹ (IC 7.1-3-19-11)

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the Lake County LB to deny the renewal in this matter was not based on substantial evidence and must fail. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Applicant and against the LB and the appeal of permittee, Jassy, Inc., d/b/a Busy Corner Drugs, 3401 Michigan Avenue, East Chicago, Indiana 46312 for renewal of this Type-208 permit, permit # DL45-82281, is granted and the renewal of said permit applied for is hereby granted. Notwithstanding the previous action, said permit is hereby SUSPENDED from further use pending permittee's installation of the required sales register security device, and the Commission's written approval to permittee of the same.

DATED: _____

MARK C. WEBB, Hearing Judge